

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES BERRY,

Defendant and Appellant.

B227545

(Los Angeles County
Super. Ct. No. YA076772)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Affirmed.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Xiomara Costello, Supervising Deputy Attorney General, and Richard S. Moskowitz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Charles Berry appeals from the judgment entered following a jury trial in which he was convicted of dissuading a witness with gang enhancement and use of force findings. Defendant contends that insufficient evidence supports the gang enhancement finding and the trial court committed evidentiary error in relation to the testimony of the prosecution's gang expert. We affirm.

BACKGROUND

In 2006, Arron Saraki moved with his mother and siblings to 97th Street near Normandie Avenue. At some point, Saraki joined a 10-person neighborhood gang called HPNW or the Dubs. Defendant, defendant's sister, and defendant's close friend Carl Banks (also known as C-Mack, sometimes spelled C-Mac in the reporter's transcript) belonged to the Dubs gang. The parties stipulated that the Dubs gang constituted a criminal street gang within the scope of Penal Code section 186.22 (undesignated statutory references are to the Penal Code), and that defendant was a member of the Dubs gang. The Dubs gang did not get along with any of the other gangs in the area, including the Hoover Crips gang, although several Dubs gang members joined the Hoover Crips gang.

In 2007, Saraki witnessed a fight between Banks and a man he knew as "Country." Soon after, Country was killed. Saraki told his mother what he had seen, and she took him to the Lennox sheriff's station to speak to detectives. Although Saraki was concerned that he would become known as a "snitch," he provided information to Detective Richard Biddle. Thereafter, members of the Dubs gang and other gangs began harassing Saraki and calling him a snitch. On one such occasion, at his mother's direction, he went down the street to get a person from a neighboring apartment building. James Hearn, a member of the Dubs gang, and Raymond Russell, a Five-Nine Hoover gang member who was a friend of Banks and defendant, confronted Saraki and told him no snitches were allowed on the grounds. Saraki understood this as a reference to him providing information in the case against Banks. Saraki was angry and wanted to get a knife or bat to fight them, but his mother prevented him from doing so. Saraki's mother's

boyfriend, a veteran Hoover gang member, accompanied Saraki back to the site of the confrontation and directed Saraki to fight one of them to put an end to the harassment. Saraki fought Hearn.

Around 3:00 p.m. on May 13, 2009, Saraki walked from his home to Normandie, and then south along Normandie. As he walked past an alley, defendant approached him and asked him whether he was “snitching” on defendant’s “homeboy,” C-Mack. Saraki told defendant he was not, and that he did not know what defendant was talking about. Defendant pulled a gun from his waistband and pointed it at Saraki from a distance of eight or nine feet. Saraki slowly backed away from defendant, but they continued to talk. Defendant then put the gun and his backpack down on the ground. Saraki said he did not want to fight and began to walk away. Defendant punched Saraki in the jaw, and Saraki fell to the ground. Defendant then hit Saraki four or five times and kicked him twice. Two older men crossed the street and stood over Saraki. Saraki lost consciousness.

Sheriff’s deputies and paramedics responded to a 911 call by an unidentified person regarding the attack on Saraki. (A recording of the 911 call was played at defendant’s trial.) One of the deputies testified that Saraki was in and out of consciousness and reluctant to provide information, but said he was attacked by four male Black juveniles. The paramedics transported Saraki to a hospital, where he was treated for his injuries, which included a bruised and swollen face, a profusely bleeding arm, and a gash and knot on the back of his head.

Biddle testified that Saraki’s mother, Fanesha McCrosky, told him that on May 14, 2009, she saw defendant walking to school and asked him why he attacked and pulled a gun on her son. Defendant responded that he just showed Saraki a gun but did not point the gun at Saraki. Defendant stated that he had beaten Saraki because Banks had called him from jail and asked him to assure that Saraki would not testify against Banks. McCrosky sent Saraki to live with relatives who lived far away.

Biddle interviewed Saraki on May 18, 2009. Saraki told Biddle that after he told defendant he was not snitching, defendant said that Banks had told defendant that Saraki was snitching.

On July 16, 2009, Biddle drove Saraki to testify at Banks's murder trial. Saraki told Biddle in the car that he was afraid to testify and concerned for his safety as a result of the May 13, 2009 attack and prior threats. Saraki testified at Banks's trial, but he did not tell the truth because Russell was in the courtroom during Saraki's testimony, and this intimidated Saraki.

After this case was filed, defendant's "homeboy" went to McCrosky's residence, apologized for what happened to Saraki, and told McCrosky to advise Saraki not to testify in this case.

Prosecution gang expert Detective Mark Marbach was familiar with the Dubs gang. He testified that graffiti written by defendant in 2006 contained the name of the gang, a reference to 97th Street (the territory claimed by the gang), defendant's moniker, and Banks's moniker, thus indicating defendant's respect for Banks.

Marbach testified that it is important to gang members to earn respect within their gang by participating in gang activities. Intimidation of the community is an important gang activity because witnesses who fear the gang will not cooperate with the police or testify, and this allows the gang to get away with its crimes. Intimidation of witnesses is "the way you're able to operate as a criminal gang." Snitches are often beaten and may be shot. The worst thing a gang member can do is be a snitch against another gang member, even against a member of a rival gang. Marbach opined that the attack on Saraki benefited the Dubs gang because Saraki was going to testify against a Dubs gang member and "the defendant in this case here was going to try and stop him from testifying."

The jury convicted defendant of dissuading a witness with findings that he used force or a threat of force or violence in the commission of the offense and that the offense was committed for the benefit of, at the direction of, or in association with a criminal

street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. The jury found not true an allegation that defendant personally used a firearm in the commission of the offense and it acquitted him of assault with a firearm. The court sentenced defendant to prison for seven years to life.

DISCUSSION

1. Marbach’s testimony

Defendant contends that the trial court abused its discretion by (1) allowing Marbach to testify to an opinion regarding defendant’s “actions and state of mind,” and (2) sustaining an objection to a question defense counsel asked Marbach.

A trial court has wide discretion to admit or exclude expert testimony. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) We review the trial court’s ruling for abuse of discretion. (*People v. Mayfield* (1997) 14 Cal.4th 668, 766.)

An expert’s opinion testimony is admissible on subjects sufficiently beyond common experience that the opinion would likely assist the trier of fact. (Evid. Code, § 801.) A criminal street gang’s culture and habits constitute such a subject, and qualified police officers are permitted to provide expert testimony regarding gangs. (*People v. Williams* (1997) 16 Cal.4th 153, 196; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370–1371.) The gang expert may testify to an opinion based upon facts shown by the evidence that are restated in a hypothetical question asking the expert to assume the truth of those facts. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) But an expert may not opine on an individual’s subjective mental state, for example that the defendant had a specific intent or particular knowledge. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197–1199 (*Frank S.*); *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*), disapproved on another ground in *People v. Vang* (2011) 52 Cal.4th 1038, 1049 (*Vang*).)

a. Opinion regarding defendant’s actions and subjective mental state

The prosecutor asked Marbach, “And in your opinion, was this crime committed for the benefit of the Dubs criminal street gang?” Defendant objected that the prosecutor

must use a hypothetical question to elicit Marbach's opinion on this point. The prosecutor replied that she never uses hypothetical questions, but if the court wanted her to do so, she would. The court overruled the objection, but cautioned the prosecutor to elicit the basis for Marbach's opinion. The prosecutor restated the question, and Marbach stated his opinion: "That it does benefit the gang." The prosecutor asked the basis for Marbach's opinion, and he replied, "Well, like I was talking about, with intimidation, intimidation allows a gang to operate in the area. And in this particular case, the victim was supposed to, or did in fact testify in another trial involving a fellow gang member. And he was testifying against that gang member." Defendant objected that Marbach's response was factually flawed, in that Saraki had not testified at the time of the charged offense. The court overruled the objection, and Marbach continued: "The fact that the victim in this case was a witness, and was testifying in another—a different trial against a fellow gang member from HPNW. [¶] In doing so, as I mentioned, that's basically a capital crime in the gang world, to testify against one of your fellow gang members. Cooperating with the police, coming to court and actually testifying. [¶] So in—because of that, it was—you know, the defendant in this case here was going to try and stop him from testifying. In order to do that, he was going to have to confront the victim. [¶] And in this case, he assaulted the victim and threatened him, told him he shouldn't be snitching. And that he better not come to court. [¶] And again, as I, you know—he assaulted him in the course of doing this. And you know, my understanding is that the assault definitely affected the victim's testimony in that trial because he was afraid based on what had occurred." Defendant objected to "that conclusion" and moved to strike. The court overruled his objection.

The prosecutor's initial question improperly sought Marbach's opinion as to whether defendant's intent in committing the offense was to benefit the Dubs gang. The prosecutor should have asked Marbach to render an opinion based upon a hypothetical question tracking the evidence in the case. (*Vang, supra*, 52 Cal.4th at p. 1049.) The trial court should have sustained defendant's objection, in that the question ran afoul of

Killebrew, supra, 102 Cal.App.4th at page 658, and *Frank S., supra*, 141 Cal.App.4th at pages 1197–1199. But the court’s error was harmless because Marbach responded that the crime benefited the Dubs, which permissibly addressed the effect of the crime, not defendant’s intent.

Of greater concern is Marbach’s improper testimony that defendant both committed the offense of dissuading a witness and that he acted with the intent to stop Saraki from testifying. The trial court should have sustained defendant’s objection and motion to strike this testimony. Marbach “had no personal knowledge whether [defendant] assaulted [Saraki] and, if so, how or why; he was not at the scene. The jury was as competent as the expert to weigh the evidence and determine what the facts were, including whether [defendant] committed the assault. So [the expert] could not testify directly whether [defendant] committed the assault for gang purposes.” (*Vang, supra*, 52 Cal.4th at p. 1048.)

“The erroneous admission of expert testimony only warrants reversal if ‘it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’” (*People v. Prieto* (2003) 30 Cal.4th 226, 247, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, had the court sustained defendant’s objection and struck Marbach’s improper opinion testimony, the prosecutor could have utilized a hypothetical question that tracked the evidence to ask Marbach’s opinion about whether the offense described in the hypothetical question would have been committed for the benefit of the gang. Marbach’s response to such a hypothetical question would have put the same information before the jury. In any event, Saraki’s testimony that defendant asked him whether he was “snitching” on defendant’s “homeboy,” C-Mack, before beating him, coupled with Marbach’s unobjectionable testimony about gangs’ attitude toward, and response to, “snitching,” and the importance to gangs of witnesses to gang crimes not cooperating with the police or testifying supported a finding (without Marbach’s improper opinion testimony) that defendant intended to dissuade Saraki from testifying against Banks and engaged in the dissuasion

for the benefit of the Dubs street gang and with the intent to promote, further, or assist criminal conduct by the members of the Dubs gang. Defendant has thus failed to demonstrate a reasonable probability that he would have obtained a more favorable result in the absence of the error.

It is unclear whether defendant also contends the error violated due process. “[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*.” (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Marbach’s improper opinion testimony added little or nothing to the other very strong evidence in the record from which the jury could infer defendant’s intent to dissuade Saraki from testifying against defendant’s “homeboy” and defendant’s intent to benefit his gang and promote, further, or assist criminal conduct by his gang. Marbach’s improper testimony did not render defendant’s trial fundamentally unfair.

b. Sustaining objection on cross-examination of Marbach

On cross-examination, defendant repeatedly attempted to have Marbach testify that defendant’s sole motive for dissuading Saraki from testifying against Banks may have been defendant’s friendship with Banks, not an intent to benefit their gang. He began by asking, “[I]s it possible the sole reason, if [defendant] did in fact assault Mr. Saraki, that it was because Mr. Saraki was going to testify against his friend? Hypothetically, I mean, could that be a basis of the assault?” Marbach responded, “Well, the thing—they’re friends, they’re fellow gang members. You are friends with your fellow gang member. [¶] So to say he’s doing the assault for his friend, it’s the same as saying does the assault for his fellow gang member.” Defendant asked essentially the same question, and Marbach replied, “As I said, they’re friends. They’re fellow gang members. It’s one and the same. They’re friends as part of the gang.” Defendant then asked, “What if the reason he was doing it and his intent was solely because the person is testifying against his friend? [¶] Are you saying that’s impossible?” After the court overruled the prosecutor’s objection that the question called for speculation, Marbach replied, “In my opinion, when you’re fellow gang members, your gang members can’t snitch on gang

members. He is committing this assault because a fellow gang member is being testified against, and he's trying to prevent that testimony.”

Defendant continued in the same vein, asking repeatedly whether it was possible that defendant's sole motive was friendship, and Marbach continued to opine that their friendship was inseparable from their common gang membership. Eventually, the trial court called counsel to the bench and remarked, “We seem to be going round and round on this same issue. It's pretty clear to me that the witness doesn't want to accept the hypothetical facts as you describe them, which asks the witness to assume to be true that the motivation for the defendant is because of close friendship as opposed to the fact that the other individual is also a fellow gang member. [¶] I'm not sure how much further you're going to be able to get with that point.”

Defendant changed his approach and began asking Marbach about whether the intent of the perpetrator mattered if his acts created a benefit for the gang. Marbach agreed that the perpetrator's intent was relevant. Defendant then asked, “If the intent was for the purpose of friendship—now, I'm not asking whether you agree with that or not. I'm saying if it is for that purpose, then the result is not necessarily to enhance, even if the gang is enhanced, that does not come within 186.2 (*sic*) of an enhancement, the gang enhancement; right?” The court sustained the prosecutor's objection that the question called for a legal conclusion.

Defendant contends that the court erred by sustaining the prosecutor's objection to the final question quoted because “this is precisely what the prosecution was permitted to do earlier when Marbach essentially informed the jury ‘how he believed the case should be decided.’”

The trial court did not err. The question asked whether an act motivated by friendship would satisfy one of the elements of section 186.22, subdivision (b)(1). The question sought a legal conclusion, which is not a proper subject for expert opinion. (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841.)

Any due process claim defendant intended to assert on appeal is meritless. Proper application of the rules of evidence does not impermissibly infringe upon the defendant's right to present a defense. (*People v. Thornton* (2007) 41 Cal.4th 391, 443.)

2. Sufficiency of evidence

Defendant contends that the evidence was insufficient to support a finding that defendant "attempted to dissuade [Saraki] from testifying against C-Mack, for the benefit of Dubs and with the specific intent to do so." Defendant's contention is largely based upon a theory he argued at trial: his friendship with Banks, not their common gang membership, motivated his conduct.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) Where substantial evidence supports the verdict, we must affirm, even though the evidence would also reasonably support acquittal. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

Section 186.22, subdivision (b)(1) provides a sentence enhancement for anyone convicted of a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." The "for the benefit of . . ." element essentially means that the crime must be "“gang related.”" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

Substantial evidence supported the jury's finding, even excluding that portion of Marbach's testimony we concluded was improper. The parties stipulated that defendant was a member of the Dubs gang, and Saraki testified that Banks was, as well. Marbach's unobjectionable testimony about gangs' attitude toward "snitching" and the intimidation of witnesses explained how a gang benefits by preventing a witness to a gang crime from cooperating with the police or testifying. The prior incident in which Dubs gang member James Hearn and Hoover gang member Raymond Russell harassed Saraki for being a

snitch indicated that Saraki's cooperation with the police in the case against Banks was a source of concern to members of both the Dubs gang and at least one other local gang. Defendant's statements to Saraki before attacking him clearly showed that defendant intended to dissuade Saraki from testifying against Banks, and defendant's references to "snitching," "homeboy," and Banks's moniker C-Mack implied that defendant was at least partially motivated by his common gang membership with Banks. Collectively, this evidence supported the jury's finding that defendant committed the dissuasion for the benefit of the Dubs street gang and with the intent to promote, further, or assist criminal conduct by the members of the Dubs gang. Defendant's friendship arguments effectively ask this court to reweigh the evidence, which is not a permissible approach to a sufficiency of evidence claim. That theory was before the jury, which rejected it, perhaps because nothing in the record showed that defendant's sole motive was friendship.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.